IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Jasmine Jimenez, et al.,	)	
	)	
Plaintiff,	)	
	)	**No. 11 C 4707**
vs	)	
	)	**Judge John W. Darrah**
The State of Illinois, Lake County State's Attorney's office, Laura Horner, Assistant State's Attorney, Michael J. Waller, State's Attorney,	)	
	)	
Defendants	)	

PLAINTIFFS JIMENEZ AND ROTHEIMERS' JOINT-RESPONSE TO DEFENDANTS MICHAEL J. WALLER, LAKE COUNTY STATE'S ATTORNEY AND LAURA HORNER, LAKE COUNTY ASSISTANT STATE'S ATTORNEYS' MOTION TO DISMISS AND DEFENADANT STATE OF ILLINOIS' MOTION TO DISMISS

Plaintiffs Jasmine Jimenez ("Jimenez") and Denise Rotheimer ("Rotheimer"), Pro se, respectfully request this Honorable Court to deny Defendants Michael J. Waller, Lake County State's Attorney ("Waller"), Laura Horner, Assistant State's Attorney ("Horner"), and State of Illinois' Motion to Dismiss in its entirety pursuant to XIV Amendment, Sections 1 and 5 of the U.S. Constitution; Article III, Section 2, Clause 1 of the U.S. Constitution; Article VI, Section 1, Clause 2 of the U.S. Constitution; and 42 U.S.C. §§ 1983, 1985. Now comes Plaintiff's joint-response as follows:

1. Defendants Waller and Horner argue that "[P]laintiff Rotheimer must be dismissed from this cause of action, because the Court does not have subject matter jurisdiction with respect to her." *See*. Motion, p. 2, ¶#5. Plaintiffs Jimenez and Rotheimer dispute

the validity of Defendant's factual contention in its entirety, including the argument within Defendant State of Illinois' motion to dismiss which "[A]dopts the portions of Co-Defendants Waller and Horner's motion to dismiss that address issues of standing." *See*. Motion p. 2, ¶#6. Furthermore, Plaintiffs offer the following response:

(I). According to 725 ILCS 120/3(a) which reads, "'Crime victim' means… (3) … the … parent … of any person granted rights under this Act who is physically or ***mentally incapable of exercising such rights***…" (Emphasis added) Plaintiff Rotheimer as defined by applicable Illinois law does have standing to state a claim as a crime victim due to the fact that her daughter, Plaintiff Jimenez entered the criminal justice system as a young child who was merely 12 years of age and thereby mentally incapable of exercising such rights. Furthermore, pursuant to 725 ILCS 115/3(a) the Bill of Rights for Children, which reads, "In any case where a defendant has been convicted of a violent crime involving a child … for any offense defined in Section 12-3 through 12-16 of the Criminal Code of 1961… ***the parent***… upon his or her request, ***shall have the right*** to address the court regarding the impact, which the defendant's criminal conduct… has had upon the child. If the parent… chooses to exercise this right, the ***impact statement*** must have been prepared in writing in conjunction with the Office of the State's Attorney prior to the initial hearing or sentencing, before it can be presented orally at the sentencing hearing. The court shall consider any statements made by the parent… along with all other appropriate factors in determining the sentence of the defendant…." (Emphasis added). Plaintiffs humbly contend that this Honorable Court does have subject-matter jurisdiction with respect to Plaintiff Rotheimer and both Plaintiffs Jimenez and Rotheimer humbly requests the

Honorable judge to deny Defendants Waller and Horners' motion to dismiss in its entirety, and Defendant State of Illinois' motion to dismiss per their adoption of Co-Defendants Waller and Horner's argument pursuant to Plaintiff Rotheimer's standing in its entirety.

2. Defendants Waller and Horner argue that "[P]laintiff's Complaint must be dismissed because Defendants Waller and Horner are entitled to immunity under the Eleventh Amendment." *See*. Motion, p. 3, ¶#6. Plaintiffs dispute Defendants Waller and Horner's arguments in its entirety and offer the following response:

(I). In *Davidson v. Cannon*, 474 U.S. 344 (1986), Justice Brennan, dissenting, "Conduct that is wrongful under 1983 surely cannot be immunized by state law. A State can define defenses, including immunities, to state-law causes of action, as long as the state rule does not conflict with federal law. *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979). But permitting a state immunity defense to control in a 1983 action 'would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.'" *Martinez v. California*, 444 U.S. 277, 284, n. 8 (1980), quoting *Hampton v. Chicago*, 484 F.2d 602, 607 (CA7 1973), cert. denied, 415 U.S. 917 (1974). Secondly, since 1983 was designed to attack the misuse of state power, "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms." *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974). Therefore, Plaintiffs Jimenez and Rotheimer humbly request the Honorable judge to deny Defendants Waller and Horner's motion to dismiss in its entirety.

3. Defendants Waller and Horner argue that "[P]laintiff's Complaint must be dismissed because, as evidenced by the allegations contained within the Complaint, their claims are time-barred." *See*. Motion, p.3, ¶#7. Plaintiffs dispute Defendants' arguments in its entirety, including the argument within Defendant State of Illinois' motion to dismiss which "[A]dopts the portions of Co-Defendants Waller and Horner's motion to dismiss that address the issue of violations of statute of limitations." *See*. Motion p. 2, ¶#6. Plaintiffs offer the following response:

(I). As evidenced by the actions contained within the Complaint, Plaintiff Rotheimer sought legal recourse against Defendant Horner, immediately following the conviction of Plaintiff Jimenez' offender, Michael DeSario on February 18, 2003 in 02 CF 3630, a case in the Nineteenth Judicial Circuit of Lake County, Illinois and was denied access to the courts on February 25, 2003, because she was informed by a private attorney that crime victims are denied a cause of action for damages pursuant to 725 ILCS 120/9. *See*. Complaint, p. 2-3.

(II). Furthermore, Plaintiff Rotheimer sought legal action against Defendant Waller by personally meeting with David Navarro, Assistant Attorney General ("Navarro") at the Attorney General's Office which she documented in an email sent to Navarro on November 16, 2009: "[M]r. Navarro, as I stated in our meeting, … SAO Waller['s] ultimate expression of animosity came on April 23, 2009 when he denied me access to crucial information on the charges against my daughter's offender which prevented me from testifying as a witness in the case. …In reference to Waller's statement (Daily Herarld article, September 27, 2009) '… the way the system works'

is best reflected in the NAAG (National Association Attorneys General) letter on April 14, 2009, 'We are convinced that statutory protections are not enough; only a federal constitutional amendment will be sufficient to change the culture of our legal system.' Mr. Navarro, I pray that Attorney General's Office decision to prosecute SAO Waller on a felony charge of Aggravated Intimidation will ultimately result in a first step towards abolishing the culture of our legal system which denies crime victims their basic rights to fair treatment and due process." Plaintiff Rotheimer, acting with authority on behalf of her daughter, Jasmine as a crime victim to assert their rights was deprived of all her attempts to seek access to the courts and a remedy for justice as evidenced in Plaintiff's Complaint on page 3 concerning the ARDC's response on May 11, 2009. Furthermore, Plaintiff Rotheimer filed a complaint independent of her daughter, Jasmine Jimenez, as a pauper on January 31, 2011 in the United States District Court Northern District of Illinois Eastern Division, Case No. 1:11-cv-00682, *Denise Rotheimer v. State of Illinois,* whereby she stated a claim that the prosecutor violated her rights throughout the criminal justice process and that the statutes in question are unconstitutional because they were enacted in violation of the Fourteenth Amendment. Therefore, since Plaintiffs actively, promptly, diligently and consistently sought access to the courts and a remedy to redress their grievances for their injuries and deprivation of their rights and have been repeatedly denied such access or relief, both Plaintiffs Jimenez and Rotheimer humbly requests the Honorable judge to deny Defendants Waller and Horner's motion to dismiss in its entirety, and Defendant State of Illinois' motion to dismiss per their adoption of Defendants Waller and Horner's argument pursuant to violations of statute of limitations in its entirety.

4. Defendants Waller and Horner argue that "[P]laintiff's Complaint must be dismissed because it fails to state a cause of action in that it does not allege a life, liberty or property interest entitling Plaintiffs to constitutional protection." *See*. Motion, p. 3, ¶#8. Plaintiffs dispute Defendant's arguments in its entirety and offer the following response:

(I). Justice Bradley dissenting, "Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all…. This right to choose one's calling is an essential part of that liberty which it is in the object of government to protect; and ***a calling, when chosen, is a man's property right***…. A law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law." Slaughter-House cases, 83 U.S. (16 Wall.) 36, 116, 122 (1873). (Emphasis added.)

(II). Clearly, the State of Illinois cannot enact laws that deprive citizens of their liberty or property interests without due process or equal protection of the laws. As such, Article 1, Section 8.1(d) of the Illinois Constitution and 725 ILCS 120/9 of the Rights of Crime Victims and Witnesses Act deprived Plaintiffs of due process and equal protection under 725 ILCS 120/4(a) of the Rights of Crime Victims and Witnesses Act, which reads, "Crime victims ***shall*** have the following [ten] rights…" and 725 ILCS 120/4.5 (b)(9), which reads, "The Office of the States Attorney ***shall***

inform the victim of the right to … retain an attorney, … to receive copies of all notices, motions and court orders filed thereafter in the case, in the same manner as if the victim were a named party in the case." (Emphasis added.) Furthermore, 725 ILCS 120/9 which reads, "Nothing in this Act shall create a ground for appellate relief …. Failure of the crime victim to receive notice as required, however, shall not deprive the court of the power to act regarding the proceeding before it," in fact violates Plaintiff's fundamental right to due process and equal protection of the laws. "Due process requires an opportunity for hearing before a deprivation of liberty or property can take place. Moreover, where 'important interests' of the citizen are implicated (*Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90) they are not to be denied or taken away without due process."

(III). Clearly, 725 ILCS 120/9, which reads, "This Act does not … grant any person a cause of action for damages or attorneys fees," deprived Plaintiffs of their Fourteenth Amendment right to equal protection of the Illinois Constitution, Article 1, Section 12, which reads, "***Every person shall find a remedy in the laws*** for all injuries and wrongs which he receives to his person, privacy, property or reputation. ***He shall obtain justice by law,*** freely, completely, and promptly." (Emphasis added.) As crime victims, Plaintiffs Jimenez and Rotheimer were denied access to the courts and deprived of a remedy for the violation of their rights throughout the criminal justice system because the statutes in question fail to enforce state laws, provide a remedy for the violation of crime victims' rights and due process or equal protection of the laws which is a violation of the Fourteenth Amendment. "Although the Court has expressed a reluctance to attempt a definitive enumeration of those privileges and immunities of

United States citizens which are protected (by the Fourteenth Amendment) against state encroachment, it nevertheless felt obliged in the Slaughter-House Cases 'to suggest some which owe their existence to the Federal Government, its National character, its Constitution, or its laws.' Among those which it then identified were the rights of ***access to … the courts of justice***." (Emphasis added.) On April 15, 2004 all 50 Attorneys General, including Lisa Madigan, Illinois Attorney General signed a letter, which reads, "As Attorneys General from diverse regions and populations in our nation, we continue to see a common denominator in the treatment of crime victims throughout the country. Despite the best intentions of our laws***, too often are crime victims still denied basic rights to fair treatment and due process*** that should be the birthright of ***every citizen who seeks justice through our courts***." (Emphasis added.) Therefore, Plaintiffs humbly request the Honorable judge to deny Defendants Waller and Horner's motion to dismiss in its entirety.

5. Defendant State of Illinois argues that "Plaintiff's claims against the State of Illinois must be dismissed pursuant to either F.R.C.P. 12(b)(1) or 12(b)(6), as the State is immune from suit pursuant to the Eleventh Amendment." *See.* Motion, pg. 2, para. 3. Plaintiffs dispute Defendant's factual contention in its entirety and offer the following response:

(I). Congress has power to abrogate state sovereign immunity when it does so unequivocally and pursuant to a grant of constitutional authority. If the abrogation is constitutionally valid, ***states may be sued in federal court in their own name for violations of relevant statutes to which the abrogation applies***, and plaintiffs may

recover damages from states if the underlying statute so provides. *Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62, 73-74 (2000). (Emphasis added.) "The constitutional privilege of a State to assert its sovereign immunity * * * does not confer upon the State a concomitant right to disregard the Constitution or valid federal law." 119 S. Ct. at 2266; accord *Osteen v. Henley*, 13 F.3d 221, 223 (7th Cir. 1993). The Eleventh Amendment bars private suits against a State or an arm of a State sued in its own name, ***absent a valid abrogation by Congress*** or waiver by the State. See *Alden v. Maine*, 119 S. Ct. 2240, 2267 (1999). (Emphasis added.)

(II). Clearly, "Congress has the power under Section 5 of the Fourteenth Amendment to abrogate state immunity in the context of suits for damages against the State, at least to the extent that such suits challenge conduct claimed to violate the Fourteenth Amendment." *United States v. Georgia*, 546 U.S. 151 (2006). *See also Alaska v. EEOC*, 564 F.3d 1062 (9th Cir. 2009) (en banc) (holding that gender and racial discrimination, harassment and retaliation claims by employees of the Alaska governor's office were not barred by sovereign immunity because each claim alleged an actual constitutional violation). Therefore, the State of Illinois can be sued in federal court for violations of relevant statutes to which the abrogation applies under Section 5 of the Fourteenth Amendment. Furthermore, Plaintiffs include in their complaint "enough factual matter to nudge their claims across the line from conceivable to plausible" and will prove that the statutes in question violate Section 1 of the Fourteenth Amendment of the U.S. Constitution and deprived Plaintiffs of their liberty and property interest without due process or the equal protection of the laws. Based on the clear language and intent of Article III, Sec. 2, Clause 1, of the U.S.

Constitution, which reads, “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, … under their authority; …and ***between a State, or the Citizens thereof***….” (Emphasis added.) For when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law. U.S. Constitution, Article VI, Section 1, Clause 2.

(III). Furthermore, the Supreme Court has stated that at the pleading stage of a proceeding: "[A] complaint should not be dismissed unless ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’" *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957); see 5 C. Wright & A. Miller, Federal Practice and Procedure Secs. 1202, 1205-1207, 1215-1224, 1228 (1969). Therefore, this Court having jurisdiction to enforce the provisions of the Fourteenth Amendment, pursuant to F.R.C.P. 12 (b)(1) and the Plaintiffs having stated a claim upon which relief can be granted, pursuant to F. R. C. P. 12 (b)(6), Plaintiffs Jimenez and Rotheimer respectfully request the Honorable judge to deny the Defendant State of Illinois’ motion to dismiss in its entirety.

6. The Defendant State of Illinois argues “[A]ny claim under § 1983 must be dismissed as the State is not a ‘person’ subject to suit.” *See*. Motion, pg. 2, para. 4. Plaintiffs dispute Defendant’s argument in its entirety and offer the following response:

(I). Justice Stone, writing in *Hague v. CIO*, 307 U.S. 496, 525-526 (1939), expressed the opinion that 1983 was the product of an "exten[sion] to include rights, privileges and immunities secured by the laws of the United States as well as by the Constitution." Accordingly, the Court after extensively reviewing the legislative history of § 1983 in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961): "It is abundantly clear that ***one reason the legislation was passed was to afford a federal right in federal courts*** because, by reason of prejudice, passion, neglect, intolerance or otherwise, ***state laws*** might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by ***the Fourteenth Amendment*** might be denied by the state agencies." Id., at 180, 81 S.Ct., at 480. (Emphasis added.). The legislative history of § 1983's predecessor makes clear that Congress intended to alter the federal-state relationship with respect to the protection of federal rights. "The very ***purpose of § 1983 was to interpose the federal courts between the States and the people***, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242, 92 S.Ct. 2151, 2162, 32 L.Ed.2d 705 (1972). (Emphasis added.) In particular, Congress intended "to provide a federal remedy where the state remedy . . . was not available in practice." *Monroe v. Pape*, 365 U.S., at 174, 81 S.Ct., at 477.

(II.) On March 2, 2001, Mr. John Piland, Planning and Research Committee Member of the Illinois Criminal Justice Authority, expressed concern that "while we do need to do more for victims, the plan's objective to develop a system of recourse for victims who feel their rights have been violated is not consistent with where we really are in this process." Mr. Piland said "he thinks that we are jumping ahead of

ourselves in terms of our ability to provide recourse when victims don't know what their rights are…" As such, the violation of federal law must be ongoing to warrant injunctive relief or declaratory relief. The Court explained that "remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour,* 474 U.S. 64, 68, 73 (1985).

(III). Plaintiffs Jimenez and Rotheimer complained that the State of Illinois enacted Section 8.1(d) under Article 1 of the Illinois Constitution and Section 9 under 725 ILCS 120/9 of the Rights of Crime Victims and Witnesses Act in violation of Section 1 of the Fourteenth Amendment and that those provisions deprived Plaintiffs of their fundamental rights to due process and equal protection of the laws. Should the Plaintiff's Complaint be dismissed with prejudice based on the argument that the State is not subject to suit under 42 U.S.C. § 1983 or that the State of Illinois is not a person subject to suit under 42 U.S.C. § 1983, which is an extension to include the Fourteenth Amendment and afford citizens a federal right in federal courts, then by its own ruling this Honorable Court would declare Section 5 of the Fourteenth Amendment, which reads, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article," null and void. Therefore, Plaintiffs respectfully request the Honorable judge to deny the Defendant State of Illinois' motion to dismiss in its entirety.

7. Defendant State of Illinois argues "[E]ven in the event the Court considers the merits of any statutory challenge, Plaintiffs have no federally protected rights as victims of a crime in a criminal prosecution, and as such any challenge must fail." *See*.

Motion, pg. 2, para. 5. Plaintiffs dispute Defendants' arguments in its entirety and offer the following response:

(I). Justice Marshall's Interpretation of the National Supremacy Clause in *McCulloch v. Maryland* and *Gibbons v. Ogden,* asserted his opinion that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared." As such, Section 1 of the Fourteenth Amendment establishes the scope of a citizen's rights; privileges, immunity, and equal protection. Clearly, citizens have fundamental rights and any rights exclusively belonging to citizens are the Property of that citizen for which they are guaranteed due process and equal protection of the laws.

(II). As evidenced in Plaintiff's Complaint, Plaintiff Rotheimer states a claim that Defendant Michael J. Waller, Lake County State's Attorney instructed his receptionist that no one was to speak with her, and on his direct order required Assistant State's Attorney, Patricia Fix who handled the case against Plaintiff Jimenez' offender—after he was arrested in February 2009 for a violation of his parole and not for a new offense—to deprive Rotheimer of information on the criminal case for which she was entitled and the law required, pursuant to 725 ILCS 120 4/(a), which reads, "Crime victims shall have the following rights (1) The right to be treated with fairness and respect for their dignity and privacy throughout the ***criminal justice process***. (2) The right to notification of court proceedings. (3) The right to

communicate with the prosecution. (4) The right to make a statement to the court at sentencing. (5) The right to information about the conviction. (6) The right to timely disposition of the case following the arrest of the accused. (7) The right to be reasonably protected from the accused throughout the criminal justice system. (8) The right to be present at the trial and all other court proceedings on the same basis as the accused,…. (10) The right to restitution. *Se*e. Complaint, p. 3. Plaintiff's Complaint in fact states a claim of an overt act "whereby another is injured in person or property, or ***deprived of having and exercising any right or privilege of a citizen of the United States***" that is required to make any Sec. 1985 conspiracy actionable. Sec. 1985(3). (Emphasis added).That subsection reaches "two or more persons . . . (who) conspire . . . , for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." As clearly explained in the acute analysis set forth by Judge (now Mr. Justice) John Paul Stevens, speaking for … [The United States Court of Appeals, Seventh Circuit] in *Dombrowski v. Dowling*, 459 F.2d 190, 194-96 (C.A.7, 1972); and *Cohen v. Illinois Institute of Technology*, 524 F.2d 818, 828-29 (C.A.7, 1975), "an equal protection claim of this character is one species of a claim alleging violation of the Fourteenth Amendment, and hence like ***all Fourteenth Amendment claims*** requires State action." (Emphasis added). Therefore, Plaintiffs respectfully request the Honorable judge to deny Defendant State of Illinois' motion to dismiss in its entirety.

WHEREFORE, Plaintiffs Jimenez and Rotheimer respectfully request that the Court enter an order denying Defendants Michael J. Waller, Lake County State's Attorney and Laura Horner, Assistant State's Attorneys' motion, and Defendant State of

Illinois' motion to dismiss in its entirety pursuant to XIV Amendment, Sections 1 and 5 of the U.S. Constitution; Article III, Section 2, Clause 1 of the U.S. Constitution; Article VI, Section 1, Clause 2 of the U.S. Constitution; and 42 U.S.C. §§ 1983, 1985. Furthermore, in the fairness of justice and as tax payers, Plaintiffs Jimenez and Rotheimer humbly request the Honorable judge to deny Defendants Waller and Horner's request for attorney's fees and costs associated with bringing forth their Motion to Dismiss, and for other relief to which Defendants Waller and Horner may feel entitled.

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